A

CHUNG VUI KONG v. K.K.I.P. SDN BHD

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
ZABARIAH MOHD YUSOF JCA
VAZEER ALAM MYDIN MEERA JCA
B [CIVIL APPEAL NO: S-02(NCVC)(W)-1269-06-2018]
19 MAY 2020

CONTRACT: *Termination – Damages – Architectural fees and loss of profits – Agreement repudiated 18 years earlier – Absence of acceptance of repudiation –*
C *Whether agreement subsisted – Whether claim confined to works actually carried out – Whether any beneficial work carried out to justify payment – Whether non-existence of project negated claim for loss of profits – Architects (Scale of Minimum Fees) Rules 1986, r. 5 – Architects Rules 1996, r. 28*

D ***CONTRACT:*** *Repudiation – Damages – Claim for loss of profits – Repudiatory event occurred 18 years earlier – Whether right of termination could be exercised after having elected to keep agreement alive – Whether causation between breach and loss of profits established – Whether loss of profits recoverable – Contracts Act 1950, s. 74(2)*

E ***LIMITATION:*** *Accrual of cause of action – Right of action – Claim for loss of profits – Whether right to enforce claim barred by limitation*

The appellant ('plaintiff'), practising under the name of PC Chartered Architect, on 14 March 1997, was appointed by the respondent ('defendant') as its Prime Consultant for a residential development of the site known as
F V20 project, for both the earthworks and the building works ('V20 project'). The parties entered into a memorandum of agreement comprised of: (i) the conditions of engagement under the Architects (Scale of Minimum Fees) Rules 1986; (ii) conditions of engagement of an architect, terms of reference, fee structure and reimbursables; and (iii) proposed site layout and
G implementation schedule ('agreement'). *Vide* a letter dated 18 September 1997, the plaintiff submitted the development plans, under the schematic design phase, for the building works to Majlis Perbandaran Kota Kinabalu ('MPKK') for the V20 project. After the submission of the development plans to MPKK, the plaintiff, on 24 October 1997, requested for instructions from
H the defendant to proceed further. However, no instruction was forthcoming for the plaintiff to proceed to the next phase, the design development phase. Subsequently, by a letter dated 21 November 1997 the defendant informed the plaintiff that the submission of the development plan phase and submission of building plans to the local authorities be deferred until further market study was carried out. The V20 project never proceeded any further.
I On 8 May 1998, MPKK rejected the plaintiff's submission of the development plans. Sometime in March 2005, upon the defendant's request

to prepare new schematic drawings, the plaintiff prepared the preliminary designs for the defendant's consideration in 2005/2006. However, there was no further progress to the 2005/2006. The plaintiff had been paid RM124,179.21 sometime in March 2005 for works done in respect of the professional fees for the V20 project. The plaintiff alleged that although he had rendered architectural services to the defendant in 1997 to 1998 and then again in 2005-2006, he had not been paid in full for such services since the parties could not agree on the value of such services. As a result, the plaintiff terminated the agreement with the defendant *vide* letter dated 25 October 2015 and commenced the present action against the defendant for the architectural fees carried out for the schematic design phase in 1997 and also for the work done in 2005/2006. The High Court dismissed the plaintiff's claim and hence, the appeal, which was confined only to the claim by the plaintiff for damages for the alleged loss of profits. The issues for the court's determination were (i) whether there was repudiation by the defendant of the agreement; (ii) whether the plaintiff was entitled to claim for damages in the form of loss of profits when the agreement governing them were statutorily provided; and (iii) if the answer to para. (ii) was in the affirmative, whether the claim for the loss of profits was time-barred.

Held (dismissing appeal with no order as to costs)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The defendant had repudiated the agreement, the earliest being at the time when the 1997 project was deferred for further market study on 21 November 1997. However, there was no indication by the plaintiff as to his acceptance of the repudiation. The plaintiff was thus presumed to have treated the contract as being subsisting. The plaintiff had only indicated its intention to no longer be bound by the contract when it terminated the contract on 24 October 2015, 18 years from the first repudiation by the defendant. Further, there was no prayer seeking a declaration or order that the defendant had purportedly repudiated the agreement. (paras 44-46)

(2) The memorandum of agreement expressly provided that the appointment of the plaintiff was subject to and would be in accordance with the conditions of engagement under the Architects Rules 1996. Rule 28 of the Architect Rules 1996 read with para. 2(1) of the Second Schedule thereto provides that the plaintiff 'shall be remunerated solely by fees payable by the client'. The provisions of the Architects (Scale of Minimum Fees) Rules 1986 provides that the plaintiff was entitled to payment for the actual architectural work that he had carried out. The architectural fees for each of the four phases was payable 'upon completion of each phase'. Accordingly, the plaintiff could only claim the fees for the architectural work that was actually carried out. (paras 47, 56 & 58-60)

(3) Although the agreement did not expressly exclude the claim for the loss of profits, the provision of the agreement appeared to restrict the claim for the loss of profits by the plaintiff. The defendant did not instruct nor gave its consent to the plaintiff to carry out the subsequent design development phase and the contract documentation phase. Effectively, there was no beneficial works carried out by the plaintiff for the V20 project for the defendant that entitled him to be paid. It never proceeded beyond the schematic design phase, which was very much at an infant stage, when it was rejected by MPKK. Although the plaintiff claimed the V20 project was 'revived' in 2005/2006, it was not proven that the work was a continuation of the V20 project. As the V20 project had not been proven to be in existence any longer, even in 1997, the plaintiff could not be entitled to claim for loss of profits premised on the assumption that he would have earned profits upon completion of the V20 project. (paras 66, 69-72 & 75)

(4) Rule 5 of the Architects (Scale of Minimum Fees) Rules 1986 provides for the basic services to be provided by the plaintiff to be severable into four distinct phases, which meant that the agreement was not an 'entire contract', and thus, severable. The claim for the loss of profits would only have happened if the V20 project was in existence and ongoing then. However, the V20 project never proceeded beyond the schematic design phase. Once the agreement was terminated by either party pursuant to cl. 16 of the 'conditions of engagement of an architect', all that the architect was entitled to claim was 'the balance of fees due together with any outstanding claims for reimbursable charges'. The plaintiff was not entitled to claim for the architectural fees as there was never any beneficial work done for the plaintiff in 1997. Therefore, there was no basis for the claim for loss of profits by the plaintiff. (paras 76, 80 & 83)

(5) The plaintiff's claim for loss of profits was specifically confined to the V20 project. However, the works by the plaintiff for the V20 project was rejected by MPKK and was of no use or benefit to the defendant. The plaintiff pleaded that the 'estimated costs and expenses to be incurred by the plaintiff to complete the project' was RM1,857,600. The architectural fees for the work done in 1997 was conceded by the plaintiff as barred by limitation. Hence, this sum must be deducted from the total claim for loss of profits. Further, the calculation provided by the plaintiff in his claim depicted a situation that the plaintiff would have suffered a loss of 641,095.49, hence, negating the claim for the loss of profits. If the plaintiff proposed to make a claim for the loss of profits, it would be based on the 2005/2006 project and certainly not the 1997 project. Hence, the plaintiff's claim for the alleged loss of profits for the 1997 project was without merit and unfounded. As for the 2005/2006 project, the plaintiff did not tender any evidence for any alleged loss of profits for the 2005/2006 project. (paras 89-95)

(6) It was open for the plaintiff to terminate the agreement upon the occurrence of the repudiatory events as early as 1997. However, the plaintiff elected to keep the agreement alive until 2015. Once elected, there was no issue of the plaintiff subsequently exercising right of termination. There was no causation established between the breach and the loss of profits by the plaintiff. The plaintiff had not shown that the loss of profits was the natural and probable result of the breach by the defendant, and neither had it been shown that the defendant knew of the loss the respondent would have suffered if they committed the breach at the formation of the contract. Clearly there was no nexus, direct or indirect, between the alleged breach of the defendant to the claim for the loss of profits. The plaintiff failed to prove the causation between the defendant's breach and his loss of profits. It was too remote. Applying s. 74(2) of the Contracts Act 1950, such compensation was not recoverable. (paras 98, 101 & 103)

(7) The limitation had started to run against the plaintiff's claim dated 10 December 1997 from 11 December 1997, the earliest time that the plaintiff could have brought an action for its claim against the defendant. The termination of the agreement on 24 October 2015 from which the alleged damages for the loss of profits arose, was different from the accrual of the plaintiff's cause of action for the damages for the alleged loss of profits pursuant to items 94 and 95 of the Schedule to the Sabah Limitation Ordinance. Pursuant to items 94 and 95 of the Schedule, six years from the time when 'the contract is broken', namely, from the first time that the defendant repudiated the agreement would be on 21 November 1997 or upon non-payment of the plaintiff's claim dated 10 December 1997. The termination of the agreement by the plaintiff was not the plaintiff's cause of action for damages for the alleged loss of profits. By failing to commence the claim against the defendant for the alleged loss of profits within six years from the breach, namely 21 November 1997, or upon non-payment of the plaintiff's claim dated 10 December 1997, the plaintiff's right to enforce a claim against the defendant was barred by limitation. (paras 115, 117, 122 & 124)

Case(s) referred to:

Abraham Ho Ah Loke v. William Manson-Hing [1948] 1 LNS 2 HC ***(refd)***
Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(dist)***
Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***
Borneo Housing Mortgage Finance Bhd v. Mygal Gibie & Anor [2004] 2 CLJ 525 HC ***(refd)***
Edwin Hill & Partners v. Leak Cliffe Properties Ltd & Anor 29 BLR 43 ***(refd)***
Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd [1974] AC 689 ***(foll)***
Hadley v. Baxendale [1854] 9 Ex 341 ***(refd)***
Malayan Banking Bhd v. Saujana Pesona Sdn Bhd & Ors [2016] 10 CLJ 92 CA ***(refd)***
Moschi v. Lep Air Services Ltd [1973] AC 331 ***(refd)***
Photo Production Ltd v. Securicor Transport Ltd [1980] AC 827 ***(refd)***

Ronex Properties Ltd v. John Laing Construction Ltd & Ors (Clarke Nicholls & Marcell (A Firm), Third Parties) [1983] 1 QB 398 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
Thomas v. Hammersmith Borough Council [1993] 2 All ER 203 ***(refd)***

Legislation referred to:
Architects Act 1967, ss. 34(1), 35
Architects Rules 1996, rr. 28, 29(1), Second Schedule para 2(1)
Architects (Scale of Minimum Fees) Rules 1986, rr. 3(c), 4(iv), 5(1)(iii), (2)(ii), (3)(i), (4), 7, 10(1), (2)
Contracts Act 1950, ss. 40, 70, 74(1), (2)
Limitation Ordinance (Sabah) (Cap 72), s. 8(1) Schedule items 94, 95

Other source(s) referred to:
Adam Kramer*, The Law of Contract Damages*, 2nd edn, paras 1-04
Chitty on Contracts, 32nd edn, p 2043 paras 28-32, p 2080
Hudson's Building and Engineering Contracts, 13th edn, paras 2-006
Keating on Building Contracts, 7th edn, London: Sweet & Maxwell, 2001, p 189

For the appellant - David Fung; M/s Alex Pang & Co
For the respondent - Govinda Raj; M/s Raj & Co

[Editor's note: Appeal from High Court, Kota Kinabalu; Suit No: BKI-22NCVC-33-3-2016 (affirmed).]

Reported by S Barathi

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appellant (the plaintiff in the High Court), appeals against the decision of the learned Judicial Commissioner dated 18 May 2018, after a full trial which dismissed the plaintiff's claims.

[2] Parties shall be referred as they were, in the High Court.

[3] The claim by the plaintiff against the defendant is for damages, namely, architectural fees and loss of profit. The defendant denies that it is liable to pay any monies to the plaintiff; or alternatively, if at all the defendant is found liable to pay any architectural fees, such fees ought to be in accordance with the quantum that had been assessed and evaluated by its cost consultant.

[4] We heard submissions by both parties on 27 September 2019 and we queried counsel for the plaintiff whether his client was entitled to claim for the alleged loss of profits, in view of the provisions of the Architects Act 1967, Architects Rules 1996 read together with the agreement which the parties had entered into. As both counsels were unable to provide an

immediate response to the said query, we directed parties to submit further written submissions for our consideration, with particular reference to the viability of the claim on the alleged loss of profits *vis-à-vis* the Architects Act 1967, the Architects Rules 1996 read with the agreement. Accordingly, we reserve judgment on the appeal to a date to be fixed.

[5] After due consideration of the further written submissions from parties and the appeal records, we are now ready to deliver our decision on the said appeal. We now state our reasons in arriving at our decision in the following paragraphs which shall constitute the judgment of the court.

Background

[6] The plaintiff practices under the name of PC Chartered Architect. On 14 March 1997, the defendant appointed the plaintiff as its prime consultant for a residential development of the site known as V20 project at Sapangar Road, in Kuala Menggatal, Kota Kinabalu, Sabah for both the earthworks and the building works (V20 project). The parties entered into a memorandum of agreement which comprises the following:

(i) the conditions of engagement under architects (Scale of Minimum Fees) Rules 1986;

(ii) conditions of engagement of an architect, terms of reference, fee structure and reimbursables;

(iii) proposed site layout and implementation schedule.

(collectively referred to as "the agreement" at pp. 563 - 594, RR vol. 2D).

[7] The defendant, by its letter dated 8 August 1997, instructed the plaintiff to complete the development plans for submission to Majlis Perbandaran Kota Kinabalu (MPKK) for approval and subsequently to prepare the working drawings for the workers apartments. The plaintiff, *vide* letter dated 18 September 1997, submitted the development plans for the building works (under the schematic design phase) to MPKK for the V20 project comprising four drawings as follows:

(i) site layout plan (sheet no. D1) dated 20 July 1997;

(ii) location plan, platform level plan c/w storm drainage & sewerage systems (sheet no. D2) dated 20 July 1997;

(iii) site sections (sheet no. D3) dated 10 September 1997; and

(iv) site sections (sheet no. D4) dated 10 September 1997.

[8] After the submission of the development plans to MPKK, the plaintiff wrote a letter dated 24 October 1997 to the defendant requesting for instructions to proceed further with the building plans (ie, the working drawings under the next phase, the design development phase). The

defendant, however, did not give any instruction to the plaintiff to proceed to the next phase ie, the design development phase pending the approval by MPKK.

[9] By letter dated 21 November 1997, the defendant informed the plaintiff that the submission of the development plan phase and submission of building plans to the local authorities be deferred until further market study was carried out. The V20 project never proceeded any further. It is also the defendant's case that, pursuant to cl. 7(2) of the "conditions of engagement of an architect" that the plaintiff must obtain the approval/ consent of the defendant before starting works on any phase.

[10] The plaintiff issued two letters dated 29 November 1997 and 10 December 1997 to the defendant. By letter dated 10 December 1997 the plaintiff forwarded copies of the development plans (four drawings) and the working drawings (15 drawings) to the defendant. The plaintiff also forwarded its payment claim #1 (reminder #1) for fees dated 10 December 1997 for RM2,600,167.08.

[11] After the building works for the V20 project had been deferred, MPKK by its letter dated 8 May 1998, rejected the plaintiff's submission of the development plans as the same failed to comply with the Kuala Menggatal Local Plan. By this letter, MPKK required the plaintiff to finalise and submit the master/local plan for the whole Kota Kinabalu Industrial Park area together with the jurisdiction for changes of the uses and infrastructure proposed in the Kuala Menggatal Local Plan. MPKK said that the development plans could not be considered unless the proposal/ development plan was amended to follow the Kuala Menggatal Local Plan.

[12] Subsequently in 2002/2003 the lands comprising the V20 project were sold to one Wilayah Jasa Sdn Bhd. However, in early 2005, Wilayah Jasa Sdn Bhd withdrew from the V20 project and the sale and purchase agreement was aborted by mutual consent after Wilayah Jasa Sdn Bhd indicated that it was not able to proceed with the proposed development for the V20 project.

[13] Sometime in March 2005, after Wilayah Jasa Sdn Bhd was no longer interested to proceed with the V20 project development, the defendant decided to re-design the V20 project and the plaintiff was requested by the defendant to prepare new schematic drawings. The plaintiff prepared preliminary designs for the consideration of the defendant in 2005/2006. The details of the work done by the plaintiff in 2005/2006 are set out at para. 15 of the statement of agreed facts. It is undisputed that there was no further progress to the 2005/2006 project after 14 July 2006. The plaintiff had been paid RM124,179.21 sometime in March 2005 for work done in respect of the professional fees for the V20 project (para. 18 of the statement of agreed facts).

[14] The plaintiff alleged that although he had rendered architectural services to the defendant in 1997 to 1998 and then again in 2005-2006, he had not been paid in full for such services since the parties could not agree on the value of such services.

[15] As a result, the plaintiff terminated the agreement with the defendant *vide* letter dated 25 October 2015. The plaintiff commenced the present action on 22 March 2016 against the defendant for the architectural fees carried out for the schematic design phase in 1997 and also for the work done in 2005/2006. The defendant by its letters dated 8 January 2014 and 18 August 2014 disputed and rejected the plaintiff's claims.

[16] Essentially, the claim by the plaintiff was for damages following from an alleged breach of contract due to the defendant's repudiation of the agreement. Initially, the plaintiff mounted his claim premised on three distinct and separate claims for damages, namely:

(a) claim for the architectural work done in 1997 as evidenced by the claim dated 10 December 1997;

(b) claim for the architectural work done in 2005/2006 which work was allegedly completed before 14 July 2006; and,

(c) loss of profits for the architectural fees that the plaintiff could have earned if the 1997 project had been completed.

[17] However, during submissions on 27 September 2019 before us, the plaintiff conceded that its claims for the work done for the 1997 project amounting to RM1,957,400.49 and for the 2005/2006 project amounting to RM 367,584.33, pursuant to para. 37, parts 1 & 3 of the statement of claim (SOC) were barred by limitation (the plaintiff's writ and its statement of claim were only filed on 22 March 2016).

[18] Hence the appeal before us is confined only to the claim by the plaintiff for damages for the alleged loss of profits pleaded at para. 37, part 2 of the SOC.

[19] The defendant's stand as to the claim by the plaintiff is that it is unsustainable because:

(i) the agreement that governed the plaintiff and the defendant does not allow for a claim for loss of profits; and

(ii) the claim for the loss of profits relates to the claim which was issued by the plaintiff on 10 December 1997, which is barred by limitation.

The Findings Of The High Court

[20] The learned trial judge found that it is undisputed that the relationship between the plaintiff and the defendant is governed by the agreement that was entered between them.

[21] From the court's findings, there was no repudiation by the defendant in its obligation to pay the architectural fees to the plaintiff.

[22] Under the Architects (Scale of Minimum Fees) Rules 1986 (the Rules) there are four phases of architectural works to be executed, namely:

(i) schematic design phase;

(ii) design development phase;

(iii) contract documentation phase; and

(iv) contract implementation and management phase.

[23] In each of these phases, the architect is required to prepare and submit the necessary plans, which are as follows:

(i) the development plans that were submitted under the schematic design phase;

(ii) the working drawings (or building plans) prepared under the design development phase - r. 5(2)(ii); and

(iii) the detailed drawings which are drawings prepared under the contract documentation phase - r. 5(3)(i).

[24] The learned trial judge found that the contention by the plaintiff that it had completed 100% of the schematic design phase was bereft of merits and unfounded due to the following:

(i) The development plans which were submitted by the plaintiff to MPKK failed to comply with the Kuala Menggatal Local Plan. Hence it was summarily rejected by MPKK. In the circumstances the plaintiff is not entitled to claim fees for 100% completion for the schematic design phase.

(ii) In view of the rejection of the development plans by MPKK, the learned trial judge held that the plaintiff was in breach of the agreement and accordingly was not entitled to receive any payment in respect of the schematic design phase, the design development phase and the contract documentation phase. This would mean that the work carried out in 1997 for the development plans was of no use, value and benefit to the defendant. It follows that the working drawings which were based on the development plans were similarly of no use or benefit to the defendant. It would be unfair and unconscionable to make the defendant pay the plaintiff for work done that obviously has no benefit or use to the defendant.

(iii) The defendant did not instruct the plaintiff to commence work to the next phase ie, the design development phase and the contract documentation phase as required under the Rules. Therefore, the plaintiff is not entitled to payment for these two phases. PW1 admitted that under the agreement (conditions of engagement of an architect) the

plaintiff was obliged to obtain the approval of the defendant before starting any phase of its professional services. As the plaintiff failed to obtain such instructions from the defendant, the plaintiff is not entitled to claim any monies under the design development phase and the contract documentation phase.

(iv) The agreement does not provide for the recovery of any loss of profits to the plaintiff. The plaintiff is limited to its claim for work done and completed under the various phases set out in r. 5 of the Architects (Scale of Minimum Fees) Rules 1986.

(v) The cause of action for the plaintiff's claim for loss of profits in respect of the 1997 V20 project accrued when the defendant suspended the same on 21 November 1997 or upon the non-payment of the plaintiff's claim dated 10 December 1997.

(vi) The cause of action for the plaintiff's claim for its architectural works for 1997 arose from the non-payment of its claim dated 10 December 1997. The limitation period had started to run against that claim from 11 December 1997 which was the earliest time that the plaintiff could have brought an action for its claim against the defendant (see *Borneo Housing Mortgage Finance Bhd v. Mygal Gibie & Anor* [2004] 1 LNS 63; [2004] 4 MLJ 12).

(vii) The cause of action for the plaintiff's architectural works in 2005/2006 arose from the non-payment for its work as per plaintiff's quantity surveyor's preliminary cost estimate no. 5 dated 14 July 2006, and the plaintiff's claim in this regard would have commenced no later from 15 July 2006. The plaintiff's claim for the architectural works carried out in 2005/2006 would have been barred by limitation with effect from 15 July 2012. The writ in this action was filed only on 22 March 2016. The limitation period would have accrued from the first time that the plaintiff became entitled to claim for its work done in 2005/2006. In *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749 (FC) where it was held that a cause of action founded on a contract accrued on the date of the breach, and in the case of a debt, the cause of action arose at the time when the debt could first have been recovered by action.

(viii) Hence the plaintiff's cause of action or causes of actions arising from the breach of contract are time barred pursuant to item 95 of the Schedule of the Limitation Ordinance (Sabah Cap 72).

[25] For the above-said reasons, the learned trial judge dismissed the plaintiff's claim.

A **Grounds Of Appeal**

[26] The plaintiff contends that the learned trial judge erred in law and fact when His Lordship:

(i) ruled that the plaintiff had no cause of action for his claim for damages for the loss of profits arising from the defendant's repudiation of the contract as according to His Lordship there was no repudiation, whereas on the evidence before him there was established repudiation as asserted and proved by the plaintiff;

(ii) decided that the plaintiff's claim was statute barred under the Sabah Limitation Ordinance;

(iii) misdirected himself that the plaintiff's claim was one for the recovery of architectural fees due to the plaintiff instead of one for damages premised on the termination of the contract or "put to an end" due to the defendant's repudiation. Therefore the learned trial judge failed to evaluate the primary facts in accordance with the plaintiff's pleaded cause of action, contentions and the admitted evidence;

(iv) in holding that the plaintiff was in breach of the agreement because of the "rejection of the development plans by MPKK" and accordingly not entitled to receive any payment in respect of the three phases of architectural work. Whereas, the defendant did not complain of breach against the plaintiff throughout the tenure of the agreement until it was terminated for breach or repudiation of the contract by the plaintiff. Such breach on the plaintiff's part as held by His Lordship was not pleaded by the defendant and was not an issue to be tried.

[27] Essentially, the plaintiff's appeal was premised on three main issues:

(i) that the defendant had repudiated the agreement, which the plaintiff had accepted by terminating the agreement, resulting in the plaintiff's right to claim damages for loss of profits;

(ii) that the plaintiff's claim for the alleged loss of profits arose after the date of the termination of the agreement by the plaintiff *vide* letter dated 24 October 2015 and thus, the claim by the plaintiff was commenced within the limitation period; and

(iii) that the plaintiff had a right, under the general law of contract to claim for damages for the alleged loss of profits arising from the termination of the agreement.

[28] The plaintiff claims that it had terminated the agreement by its letter dated 25 August 2015 and the present action, which was commenced on 22 March 2016, is still within time and not caught by limitation.

[29] The plaintiff had pleaded the sum of RM2,261,882.60 as the total loss of profits after deducting the following:

(i) the costs and expenses to carry out the architectural work amounting to RM1,857,600; and

(ii) the sum of RM1,957,400.49 for the work done in 1997.

[30] However, at paras. 106 and 107 of the appellant's written submission, the plaintiff is now claiming the increased sum of RM4,091,525 as the alleged loss of profits. This increase did not take into account the deduction of the sum of RM1,957,400.49 for the work done in 1997 despite the fact that the plaintiff had conceded that the same was barred by limitation. The plaintiff in his submission contended that the sum of RM1,957,400.49 need not be deducted because (in his own words):

> 107. There would be no necessity to deduct from this figure the damages for professional fees earned (Part 1 claim) since this amount cannot be claimed for time limitation. The deduction was necessary to prevent double recovery.

[31] The plaintiff contends that his right to termination of the agreement together with the right to claim damages for loss of profits was dependent on the defendant's repudiation, that is, the alleged wrongful conduct of the defendant in not performing its obligation under the agreement. This, according to the plaintiff is a right under common law and this right is codified in s. 40 of the Malaysian Contracts Act 1950 which provides:

> 40. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[32] It is the plaintiff's case that, although cl. 18 of the conditions of engagement of an architect (which is the clause on early termination of the agreement) states that the client shall pay to the architect the balance of fees together with all reimbursable charges due to the architect, that is not the only remedy prescribed to the plaintiff in the event of termination of the agreement. It is the contention of the plaintiff that the agreement, although prescribed by the Architects (Scale of Minimum Fees) Rules 1986, does not exclude or prohibit his common law claim for damages which comprise loss of profits after he had accepted the defendant's repudiation of the contractual obligation under the agreement. In fact, the operative words in cl. 18 of the agreement state:

> In the event that the agreement between the Architect and the client is terminated for a reason not due to the fault of either party, the client shall **subject to the rights of either party in respect of antecedent breaches of the agreement between the two parties**, pay to the architect the balance

> of fees together with all reimbursable charges due to the architect, after which the architect shall issue a letter of release to the client and the client shall be entitled to appoint another Architect to continue with the project. (emphasis added)

The plaintiff contends that the words "subject to the rights of either party in respect of antecedent breaches of the agreement between the two parties.." means that other rights of the parties are expressly reserved when one of the contracting parties terminate under the express right of termination provided under the agreement.

[33] In support of this proposition, the plaintiff adopted the view as expressed by Lord Diplock in *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717-718 when he explained:

> It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties (*cf.* Sale of Goods Act 1983, section 55). But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption. In the case of building contracts no question of usage arises to rebut the presumption.

[34] Further reliance was placed by the plaintiff on the view expressed by the learned authors of *Keating on Building Contracts* (7th edn, London: Sweet & Maxwell, 2001) at p. 189 in relation to express termination clauses:

> Contractual determination clauses do not exclude common law remedies available upon repudiation unless the agreement expressly or impliedly provides that the contractual rights are to be the exclusive remedy for the breaches in question.

[35] The plaintiff contends that the duration of the agreement would have been there for the full performance of the agreement by the parties. If not for the defendant's repudiation or breach of contract, the plaintiff would have been able to perform the agreement and earned the profits accordingly.

Pertinent Terms Of The Agreement

[36] Before tackling the issues riddling the appeal herein, it is apposite to refer to the main terms of the agreement which govern the parties, namely:

(a) Clause 3 of the memorandum of agreement which provides that:

> 3. Subject to clause 6, 7 & 8 below, in consideration of the Architect providing the professional services required, the client hereby agrees to pay the Architect in accordance with the Architects (Scale of Minimum Fees) Rules 1986.

(b) Clause 7(2) of the conditions of engagement which expressly mandates that:

> An Architect shall obtain the approval of the client before starting any phase of his professional services

[37] The relevant provisions of the Architects (Scale of Minimum Fees) Rules 1986 are:

(i) Rule 3(c) states that the cost of the works shall be arrived at (for works where tenders have not been received), based on the latest cost estimate of costs prepared by the architect and accepted by the client;

(ii) Rule 4(iv) states that the architect shall, *inter alia*, advise on all aspects of obtaining statutory approvals necessary for the implementation of the project;

(iii) Rules 5(1), (2), (3) & (4) specify the services to be provided by the architect during the four phases ie:

(a) Schematic Design Phase;

(b) Design Development Phase;

(c) Contract Documentation Phase; and

(d) Contract Implementation and Management Phase;

(iv) Rule 7 states that the architect shall be paid on either the basis of time spent or on a lump sum derived from an estimated time likely to be spent;

(v) Rule 10(1) & (2) states:

> 10.(1) **The Fees payable to the Architect** shall be made as follows:
>
> | UPON COMPLETION OF EACH PHASE | PERCENTAGE FEE FOR PHASE | CUMULATIVE PERCENTAGE FEE FOR PHASE |
> |---|---|---|
> | Schematic Design Phase | 15% | 15% |
> | Design Development Phase | 30% | 45% |
> | Contract Documentation Phase | 25% | 70% |
> | Contract Implementation and Management Phase | 30% | 100% |
>
> (2) Where the Architect **has not completed all the work** described under the Schematic Design Phase but has only prepared preliminary sketch designs or studies to illustrate the possibilities or viability of a site or cost of a scheme **the fee shall be as set out in Rule 7**. (emphasis added)

[38] The plans prepared pursuant to each of these phases are:

(i) the development plans (or schematic plans) that were submitted to MPKK were prepared under the schematic design phase - r. 5(1)(iii);

(ii) the "working drawings" (or building plans) are drawings prepared under the design development phase - r. 5(2)(ii); and

(iii) the "detailed drawings" are drawings prepared under the contract documentation phase - r. 5(3)(i) ie, the tender process.

Our Findings

[39] We will deal with the appeal according to the following issues:

(i) whether there was repudiation by the defendant of the agreement;

(ii) whether the plaintiff is entitled to claim for damages in the form of loss of profits when the agreement governing them are statutorily provided;

(iii) if the answer to para. (ii) is in the affirmative, whether the claim for the loss of profits is time barred.

Whether There Was Repudiation Of The Contract By Defendant

[40] The learned trial judge did not deal specifically on the repudiation of the contract by the defendant, although His Lordship held that there was no repudiation by defendant of its obligation to pay the plaintiff (p. 20, lines 376-381 of the grounds in the supplementary records of appeal).

[41] However, the defendant submits that it had repudiated the agreement on each of the following occasions, namely:

(i) at the time when the 1997 project was deferred for further market study on 21 November 1997. It was submitted that the V20 project definitely came to an end thereafter. This, according to the defendant was the earliest instance of the unequivocal repudiation of the V20 project;

(ii) after the rejection by MPKK of the development plans submitted by the plaintiff on 8 May 1998, the defendant did not proceed any further with the V20 project;

(iii) in 2002/2003 the defendant sold the lands on which the V20 project was to be carried out, to Wilayah Jasa Sdn Bhd. By the said sale the defendant had unequivocally made it clear that it would not proceed with the V20 project;

(iv) in 2005 (when Wilayah Jasa Sdn Bhd cancelled the sale and purchase agreement for the said lands), the defendant with the full knowledge, consent and participation of the plaintiff completely re-designed the V20 project. This re-design meant that the V20 project had irredeemably came to an end and could no longer proceed. The V20 project was substituted with the 2005/2006 project;

(v) the 2005/2006 project did not proceed at all after 14 July 2006. This was admitted by the plaintiff at para. 59 of the plaintiff's submission. Therefore the 2005/2006 project had been repudiated at the latest by 14 July 2006.

[42] The plaintiff submits that the manner in which the defendant submits and concedes on the issue of repudiation as a factual platform for its contention on the remoteness of damages is defective in law and on the facts.

[43] The law on repudiation is premised on the proposition that where a promisor repudiates a contract in its entirety, the promisee has two options, namely, the promisee may elect to accept the repudiation, treat the contract as at an end and sue for damages, or the promisee may also elect to reject the repudiation and treat the contract as subsisting (s. 40 of the Contracts Act 1950). An election once made is irreversible.

The primary obligation to perform the promise made is substituted with the secondary obligation to compensate the promisee for the breach (*Moschi v. Lep Air Services Ltd* [1973] AC 331).

[44] From the facts, it is our view that the circumstances mentioned in para. 41 above, constituted repudiation by the defendant, the earliest being, at the time when the 1997 project was deferred for further market study on 21 November 1997.

[45] Although there have been instances of repudiation by the defendant, there was no indication by the plaintiff as to his acceptance of the repudiation. One can infer that in the absence of any indication on the part of the plaintiff of such acceptance, the plaintiff is presumed to have treated the contract as being subsisting. The plaintiff had only indicated its intention to be no longer bound by the contract when it terminated the contract on 24 October 2015. The plaintiff had acquiesced to the agreement from 1997 until 24 October 2015. The termination of the agreement was done only after 18 years from the first repudiation by the defendant.

[46] Although there was no dispute by the defendant that the termination of the agreement was on 24 October 2015, the plaintiff in his SOC particularly seeks for a declaration that the agreement was terminated on 24 October 2015 *vide* prayer (1) of the SOC (p. 20 RR part A vol. 1), which is superfluous. There was no prayer seeking for a declaration or order that the defendant had purportedly repudiated the agreement.

Whether The Plaintiff Is Entitled To Claim For The Alleged Loss Of Profits

[47] The memorandum of agreement (pp. 149 - 152 of CB) expressly provides that the appointment of the plaintiff is subject to and would be in accordance with the conditions of engagement under the Architects Rules 1996. In other words, it adopts the conditions of engagement of a

professional architect as prescribed in the Architects Rules 1996 as part of the agreement. It is a standard form of agreement. For clarity, we reproduced cl. 1 of the memorandum of agreement which reads:

> 1. The client hereby appoints the Architect to provide the professional architectural services for the Project subject to and in accordance with the Conditions of Engagement as prescribed in the Rules and the Architect hereby accepts the appointment for the purpose of providing the professional services for the same subject to and in accordance with the Conditions of Engagement.

[48] Conditions of engagement of an architect are contracts and the terms within them relate to the obligations of the parties, and detail the services to be carried out and the payments to make for them.

The plaintiff is therefore bound by the Architects Rules 1996, the conditions of engagement of an architect (under r. 29) and the code of professional conduct for professional architects (under r. 28).

[49] Pursuant to cl. 2 of the memorandum of agreement, the plaintiff and the defendant had incorporated the Architects (Scale of Minimum Fees) Rules 1986 as part of the agreement between them. Clause 2 of the same states that:

> This Memorandum of Agreement, the Conditions of Engagement and the Architects (Scale of minimum Fees) Rules 1986 shall together constitute the Agreement between the client and the Architect.

[50] Section 35 of the Architects Act 1967 provides that the Board of Architects Malaysia may make rules to prescribe anything which may be required to be prescribed under the Act to enable it to perform its function as set out under the Act.

[51] The Architects Rules 1996 (P.U. (A) 379) which was made in exercise of the powers conferred by s. 35 of the Architects Act 1967 came into force on 15 August 1996. At the time when the agreement between the plaintiff and the defendant was executed on 14 March 1997, the Architects Rules 1996 was in force and applicable to the agreement.

[52] Rules 28 and 29(1) of the Architects Rules 1996 which are relevant for the purposes of this appeal read (as it then were) as follow:

> 28. Code of Conduct
>
> A person registered under the Act shall, in the exercise of his profession, observe and be guided by the provisions of the Code of Professional Conduct in the Second Schedule which are applicable to him.
>
> 29. Conditions of Engagement
>
> (1) Except with the prior approval of the Board given for special reasons, an Architect shall only enter into an agreement for his professional services according to the *Architects (Scale of Minimum Fees) Rules 1986, the Conditions of Engagement in the Third Schedule and the Memorandum of Agreement in the Fourth Schedule*.

(2) ...

(3) The Professional Architect shall be remunerated solely by fees payable by the client for architectural consultancy services provided by him.

[53] The Architects Act 1967 and the Architects Rules 1996 are binding on the plaintiff in so far as the agreement between the plaintiff and the defendant are concerned. Therefore, the provisions of the agreement, the Architects Act 1967 and the Rules made thereunder must be read together in a harmonious fashion.

[54] Paragraph 2(1) of the Second Schedule to the Architects Rules 1996, which relates to the Code of Professional Conduct For Architects states:

2. (1) The professional services of an Architect in private practice **shall be remunerated solely by fees payable by his client**. The services of an Architect in employment may be paid by salary and other benefits agreed with his employer.

[55] Rule 28 of the Architects Rules 1996 and para. 2(1) of the Second Schedule thereto form an integral part of the agreement between the plaintiff and the defendant due to the following reasons:

(a) section 34 of the Architects Act 1967 requires compliance by the plaintiff with the Architects Rules 1996, failure of which attracts penal sanction under s. 35 of the same;

(b) rule 28 of the Architects Rules 1996 and para. 2(1) of the Second Schedule thereto are deemed impliedly incorporated into the agreement by virtue of ss. 34(1) and 35 of the Architects Act 1967. We find support to this proposition in the Federal Court case of *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697, namely at paras. 45, 46 and 47 of the judgment.

[56] Rule 28 read with para. 2(1) of the Second Schedule thereto provides that the plaintiff "shall be remunerated solely by fees payable by the client". Rule 29 mandatorily requires the architect to only enter an agreement for his professional services according to the Architects (Scale of Minimum Fees) Rules 1986, amongst others.

[57] The Code of Professional Conduct for Professional Architects (made under r. 28) and the Conditions of Engagement (made under r. 29) were incorporated into the agreement.

[58] The provisions of the Architects (Scale of Minimum Fees) Rules 1986 provide that the plaintiff is entitled to payment for the actual architectural work that he had carried out. This can be discerned from r. 10(1) of the same which states:

A 10.(1) **The fees payable to the Architect** shall be made as follows:

UPON COMPLETION OF EACH PHASE	PERCENTAGE FEE FOR PHASE	CUMULATIVE PERCENTAGE FEE FOR PHASE
Schematic Design Phase	15%	15%
Design Development Phase	30%	45%
Contract Documentation Phase	25%	70%
Contract Implementation and Management Phase	30%	100%

[59] The Rule also states in the first column that the architectural fees for each of the four phases were payable "upon completion of each phase". The second column divided the architectural fees payable in the percentages stated for each phase. By this provision, the architect is only entitled to receive payment for his fees for architectural work actually carried out. This is in line with the submissions of the defendant which we found to be the correct position according to the agreement.

[60] The third column of r. 10(1) of the Architects (Scale of Minimum Fees) Rules 1986 refers to the "Cumulative Percentage Fee for Phase". A reading of the third column shows that the architect is only entitled to receive 100% of his architectural fees when he has completed all the four phases of the architectural work. In essence, the third column confirmed that the plaintiff could only claim the fees for the architectural work that was actually carried out.

[61] Putting aside the issue of payment of fees to the architect, which is regulated by the agreement and the provisions as aforesaid, we now come to the issue of the plaintiff's claim for damages ie, the claim for loss of profits.

The Claim For The Loss Of Profits

[62] We adopt the view as expressed by Lord Diplock in *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1974] AC 689 at pp. 717 - 718, that in construing contracts for the sale of goods or for work or for labour, one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used to rebut such presumption. Thus, although the contract between the plaintiff and the defendant is governed by the agreement which consists of the provisions of the Architects Act 1967 and its Rules thereunder, the common law remedies such as damages in the form of loss of profits are readily available to the innocent party when there is breach, subject, of course, to proof.

[63] The claim for loss of profits by an architect could arise from a breach of contract or as in our case from a repudiation of the contract by the defendant which was accepted by the plaintiff when the plaintiff issued its termination letter. The termination was lawful and both parties are discharged from further performing their obligations under the agreement.

[64] The plaintiff referred to the language of Lord Diplock in *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827 at p. 849 where there is substituted for the primary obligation to perform the contract, (which is discharged on termination), the anticipatory secondary obligation to pay monetary compensation to the plaintiff in consequence of the non-performance in the future. This event gives rise to the plaintiff's right to claim for the loss of profits damages as compensation for the fees he would have been able to earn if the defendant had not refused or disabled itself from performing its contractual obligation, ie, its repudiation of the contract obligation.

[65] The plaintiff submits that the nature of such a claim is premised on the fact that the plaintiff would not have to do the work to earn the fees since the primary obligation to perform in the future has been discharged. It is then substituted by the anticipatory secondary obligation to pay damages for the loss suffered by the appellant which is his agreed fees to be earned less his costs to earn those fees, in order to yield his loss of profits.

[66] However, the relationship between the plaintiff and the defendant is subjected to the agreement which provides that the fees payable to the plaintiff are governed by the Architects (Scale of Minimum Fees) Rules 1986. Although the agreement does not expressly exclude the claim for the loss of profits, we are of the view that the provision of the agreement appears to restrict the claim for the loss of profits by the plaintiff which we will elaborate in the later part of this judgment.

[67] We need to emphasise at this juncture that there was actually no beneficial work done by the plaintiff for the defendant for the V20 project, even in 1997. The development plans at the schematic design phase were rejected and not approved by MPKK. It was the requirement of MPKK that the plaintiff is to finalise and resubmit the master/local plan for the whole Kota Kinabalu Industrial Park area together with the jurisdiction for changes of the uses and infrastructure proposed in the Kuala Menggatal Local Plan. MPKK said that the development plan cannot be considered unless the proposed plans are amended to follow the Kuala Menggatal Local Plan.

[68] The project was then subsequently deferred by the defendant. This was informed to the plaintiff by the defendant in 1997. From thereon, it was unlikely that the V20 project could proceed any further in that form or manner.

[69] It was also in evidence that the defendant did not instruct nor gave its consent to the plaintiff to carry out the subsequent design development phase and the contract documentation phase. Under the agreement, it was the obligation of the plaintiff to advise the defendant on all aspects of obtaining statutory approvals. Effectively, there was no V20 project in 1997 nor any work done by the plaintiff for the plaintiff to claim the percentage; plaintiff did not have proof. Hence the learned trial judge did not err in making a

finding that the plaintiff is not entitled to claim any monies for the works in the schematic design phase, what more for the works in the subsequent design development phase and the contract documentation phase.

[70] The claim for the alleged loss of profits is premised on the assumption that the V20 project was to be carried to 100% completion. The breach by the defendant had deprived him of the profits he would have earned if he was allowed to carry out the architectural works to completion of the V20 project. However, effectively there was no beneficial works carried out by the plaintiff for the V20 project for the defendant, that entitled him to be paid. It never proceeded beyond the schematic design phase, which was very much at an infant stage, when it was rejected by MPKK. The plaintiff's witness, PW2 in his report states that as far as the design development phase in 1997 was concerned, the plaintiff had only carried out 20% of the design development phase (which was stated to be 30% of the development phase). The defendant's expert, DW2 in his report assessed the same item as 20% completed. PW1 however agreed and admitted that the 30% for the design development phase was derived from r. 10(1) of the Architects (Scale of Minimum Fees) Rules 1986 and that the plaintiff's expert, PW2 had only assessed the work done by the plaintiff at 20% of the design development phase. Even the alleged 20% work done by the plaintiff was not beneficial and of no use to the defendant, that the plaintiff is not entitled to claim for any payment. In this regard, the case of *Abraham Ho Ah Loke v. William Manson-Hing* [1948] 1 LNS 2; [1949] 1 MLJ 37 CA, is relevant where the court held that:

> (3) In the absence of an express contract, an architect is not entitled to claim for work done by him if the plans are not approved or made use of by the person who asked him to prepare the plans.

[71] The plaintiff claimed the V20 project was "revived" in 2005/2006. There is no evidence adduced to show that this was a "revived" V20 project. It was in evidence that it was undertaken on a reduced scale as compared to the V20 project.

[72] Essentially, it is not proven that the alleged work in 2005/2006 was a continuation of the V20 project.

[73] It is also not in dispute that, for the 2005/2006 project, the defendant did not proceed any further with the schematic drawings for the said works and had put an end to the same at the very early preliminary stage of the schematic design phase, when the plaintiff had terminated the agreement subsequently. Hence the assumption of the plaintiff that the V20 project had been carried out to completion is gravely flawed and misconceived, because there was no V20 project, to start with.

[74] PW1 in his evidence in chief was aware that the plaintiff could only claim in accordance to the agreement, whereby the plaintiff is subjected to r. 10(1) the Architects (Scale of Minimum Fees) Rules 1986, and the

entitlement of the plaintiff to claim for each phase of the architectural works and that such claim was "based upon completion of each phase". In this context, it is apposite to refer to r. 10(2) of the Architects (Scale of Minimum Fees) Rules 1986 to be read with r. 7:

> 10(2) Where the Architect has not completed all the work described under the Schematic Design Phase but only prepared preliminary sketch designs or studies to illustrate the possibilities or viability of a site or costs of a scheme the fee shall be as set out in Rule 7.

Rule 7 reads:

> The Architect in providing any of the advisory services described in Rule 4 shall be paid on either the basis of time spent by the Architect and his staff or on a lump sum derived from an estimate of time likely to be spent at no less than the scale of fees as prescribed hereunder and in either case, the Architect shall be reimbursed for all other incidental and out of pocket expenses:
>
> (a) the principles shall be paid at the hourly rate or rates deducted from the salary times the appropriate multiplier;
>
> (b) the technical and supporting staff shall be paid the salary times the appropriate multiplier;
>
> (c) the costs of staff other than the technical staff shall not be charged unless otherwise agreed; and
>
> (d) reimbursable expenses are paid as set out in Part IV.

The above provision only allows a claim when the "architect has not completed all the work described under the schematic design phase …" then his entitlement to payment is as prescribed under r. 7. But in our present appeal, effectively there is no beneficial work done by the plaintiff even under the schematic design phase as it was rejected by the MPKK. Hence r. 7 does not apply in our case.

[75] In addition, as the V20 project has not been proven to be in existence any longer, even in 1997, how could the plaintiff be entitled to claim for loss of profits premised on the assumption that he would have earned profits upon completion of the V20 project.

[76] This is further fortified by the provision of r. 5 of the Architects (Scale of Minimum Fees) Rules 1986 which provides for the basic services to be provided by the plaintiff to be severable into four distinct phases which means that the agreement is not an "entire contract" and thus is severable. This is evident because of the provision of payment which would only happen upon completion of each phase, thus fortifying the fact that the plaintiff is not entitled to claim for any alleged loss of profits because the V20 project never proceeded beyond the schematic design phase (even then it was only 20% which was rejected by MPKK), as the claim for the loss of profits would only happen if the V20 project was in existence and ongoing then.

[77] In an "entire" contract, if a plaintiff is prevented from performing the contract to its completion due to breach by the defendant, the plaintiff is entitled to claim for the loss of profits that he would have earned if not for the defendant's breach, as demonstrated in the case of *Akitek Tenggara* (*supra*), which we will elaborate in the later part of this judgment.

[78] The proposition that the agreement between the plaintiff and the defendant is a severable and not an entire contract, is evidenced by the presence of cls. 16 - 18 of the "conditions of engagement of an architect" which provide for early termination of contract and the rights of the plaintiff to claim for payment.

Clause 16 of the "conditions of engagement of an architect" allows either party to terminate the agreement by giving 60 days' notice (or less if agreed to, by both parties).

Clause 17 of the "conditions of engagement of an architect" states:

> 17. The Architect shall submit his accounts to the client for the balance of fees due together with any other outstanding claims for reimbursable charges not later than 30 days from the date of expiry of the notice of termination of the agreement.

Clause 18 applied where the termination was "for a reason not due to the fault of either party ...".

[79] The plaintiff's pleaded case is that the termination of the agreement on 24 October 2015 was due to the repudiation by the defendant, hence cl. 18 of the "conditions of engagement of an architect" has no application to our case.

[80] It is safe to assume that the termination in the present case would be under cl. 16 of the agreement. Once the agreement was terminated by either party pursuant to cl. 16 of the "conditions of engagement of an architect", all that the architect was entitled to claim was "the balance of fees due together with any outstanding claims for reimbursable charges". Reimbursable charges are out of pocket expenses incurred by the plaintiff such as long distance travel and communications, reproductions of documents and authorised overtime premiums. This goes to demonstrate that the architect is only entitled to claim for whatever work that was executed until the date of termination. This negated the contention of the plaintiff that he is entitled to claim for the loss of profits premised on the completion of the entire project.

[81] The plaintiff placed reliance on the Federal Court case of *Akitek Tenggara* (*supra*) in support of his contention that he is entitled to claim for the loss of profits. With due respect to the plaintiff, the facts of *Akitek Tenggara* (*supra*) and our present appeal are poles apart, in that:

(i) the employment of the plaintiff as architect in *Akitek Tenggara* (*supra*) was for a project where its professional fees is based on the agreement as contained in the plaintiff's letter dated 6 April 1984. There was no express stipulation in the engagement of the plaintiff as to the defendant's right for early termination of the plaintiff's services, which formed the issue in that case. The letter of termination was premised solely on the ground that IGB, who was at the date thereof, the majority shareholder of the defendant, intended to utilise the architects on the panel for IGB for the said project. There was a finding of fact that the project has never been abandoned and that there has been no complaint by the defendant in respect of the services rendered by the plaintiff.

DW2, the defendant's witness conceded that the plaintiff's services were terminated not because the project was abandoned but because IGB wanted to use its own architect.

He also confirmed that the JVA between the defendant and KL City Hall was still ongoing. Although the defendant contended that new amended lay out plans and amended building plans were submitted, however DW2 did not produce any of the alleged new amended layout plans and amended building plans or even a fresh JVA between the defendant, IGB and City Hall to prove that the earlier project was abandoned and a new project was replaced. There was also no new development order adduced.

There was a finding of fact by the court therein that the defendant was still continuing with the development of the said project under the existing JVA.

The court found that the defendant failed to discharge the burden of proving that the project was abandoned. It was also the finding of the learned judge in *Akitek Tenggara* (*supra*) that the termination of the plaintiff by the defendant was unlawful as the plaintiff was not in breach of the contract, hence it was held that the plaintiff was entitled to compensatory damages and loss of profits against the defendant pursuant to s. 74 of the Contracts Act 1950.

There was also the finding of fact in *Akitek Tenggara* (*supra*) that the letter of appointment of Akitek Tenggara was for an indivisible or entire contract.

(ii) In our present appeal, the contract between the plaintiff and the defendant are on terms as contained in the statutory agreements provided by the Board of Architects Malaysia. The appointment of the plaintiff architect in our present appeal is subject to r. 10(1) of the Architects (Scale of Minimum Fees) Rules 1986 read together with cl. 3 of the memorandum of agreement. This clearly subjects the

A appointment of the plaintiff herein into the four phases sets out therein which entitled the plaintiff to claim for each phase upon completion of the architectural services for that phase.

(iii) Clauses 16, 17 and 18 of the agreement in our present appeal provide for early termination of the agreement which indicate that the agreement is a divisible contract.

B

[82] A crucial difference in the facts in *Akitek Tenggara* (*supra*), is this: the architect therein was disabled by the defendant from continuing and completing the project which was still ongoing. Compared to the facts in our present appeal, the V20 project never even got off the ground. It was deferred and then no longer in existence. There were no further instructions from the defendant for the plaintiff to proceed further after the deferment order. It is a term in the agreement between the parties that until and unless the defendant gave its consent to the plaintiff to start work to the next phase, the plaintiff cannot on his own proceed further. From the facts, there were no instructions from the defendant for the plaintiff to proceed beyond the schematic design phase for the V20 project in 1997, after it was rejected by MPKK. Hence, the original V20 project was no longer in existence in 1997. There was never any development until 2005/2006. In addition, there was no proof to say that the 2005/2006 was a continuation of the V20 project as there was nothing to continue in the first place.

C

D

E

[83] It is to be noted that the Federal Court in *Akitek Tenggara* (*supra*) approved the decision of the High Court in allowing the claim for the loss of profits premised on *Thomas v. Hammersmith Borough Council* [1993] 2 All ER 203 and *Edwin Hill & Partners v. Leak Cliffe Properties Ltd & Anor* 29 BLR 43.

F

Thomas v. Hammersmith Borough Council (*supra*), addressed the issue on the termination clause of contract, which happened to be the pivotal issue in *Akitek Tenggara* (*supra*). In *Akitek Tenggara* (*supra*) the contract did not provide for an early termination clause. In summary, what is laid down in *Thomas v. Hammersmith Borough Council* (*supra*), is that, most standard form consultancy contracts contain provisions for terminating the consultancy agreement. However, in cases where a consultant has embarked upon a project and there is no agreed termination provision, the client cannot terminate the consultant's appointment at will. The consultant is to be allowed to complete the project which he commences. Where he is prevented from doing so, this will amount to a breach of contract entitling him to damages for the loss of profits. This was what was held by Slessor LJ.

G

H

In *Edwin Hill & Partners v. Leak Cliffe Properties Ltd & Anor* (*supra*) the court held that "the absence of a contractual right to terminate the engagement prior to completion of the services or the project means that the contract is in the nature of an entire contract…".

I

In *Hudson's Building and Engineering Contracts* 13th edn at paras. 2-006: A

(3) Duration and termination of Appointment

Unless there is agreement to the contrary, an appointment in explicit and unqualified terms for a particular project cannot be determined until the purpose of the appointment has been achieved. However, *it is not unusual for the contract of employment to contain provisions dividing the duties to be performed by the Architect in accordance with various stages of progress of the contemplated project and to give either party, in effect, the power of termination at the end of the various stages*. An important example is the Conditions of Engagement contained in the scale of professional charges of the RIBA. In the absence of express provision, an Architect engaged informally on a particular project may in fact be employed under a series of informal appointments rather than to one appointment covering the whole project from start to finish. In general, until the time that the decision is taken to prepare contract documents with a view to obtaining a tender, the project is frequently of a tentative or exploratory character, and the Architect is likely to be employed almost on a day-to-day basis. However, in the event of clear agreement as to the purpose of the appointment, any termination of the employment before the purpose of the appointment has been achieved would amount to a breach of contract. Thus, in *Thomas v. Hammersmith* BC Slessor LJ said: B C D

> I think it helpful first to consider what would have been the agreement between the parties if the appointment had been *simpliciter* to act as architect for the erection of the new town hall without any provision as to scale of charges, and if the council had then, before the work was completed, without cause other than their mere volition, terminated the agreement. In such case, I entertain no doubt that *the Architect would have been entitled to reasonable remuneration for the work which he had already done, and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished*. Although the contract in this assumed form would contain no express term to this effect, I think that it would be implied that the council, having employed the plaintiff to build their town hall, agreed with him that they would not prevent him from doing the work and so prevent him from earning his remuneration. (emphasis added) E F G

[84] Hence, the facts and the terms in the contract between the plaintiff (architect) and the defendant in *Akitek Tenggara* (*supra*), justified the claim by the plaintiff (architect) for the damages of loss of profits therein. H

[85] Unlike the appeal herein, there are provisions (cls. 16 - 18 of the agreement) for early termination of the contract and that the agreement between the plaintiff and the defendant provides for payment upon completion of each phase. The agreement was severable in four distinct phases and hence is not an "entire" contract as in *Akitek Tenggara* (*supra*). I

[86] The contention of the plaintiff being able to claim for its loss or profits for the entire V20 project is therefore inconsistent with r. 10(1) of the Architects (Scale of Minimum Fees) Rules 1986, which has been incorporated in the agreement between the plaintiff and the defendant herein.

[87] Given the facts as in *Akitek Tenggara* (*supra*) the plaintiff was allowed the claim for loss of profits, as the plaintiff therein was prevented from carrying out its works to completion of the ongoing project. The plaintiff in our present appeal was never prevented from working to completion for the V20 project, because there was no V20 project in the first place. As stated earlier, the plaintiff is not entitled to claim for the architectural fees as there was never any beneficial work done for the plaintiff in 1997. Therefore, there is no basis for the claim for loss of profits by the plaintiff.

Computation Of The Loss Of Profits

[88] Apart from the fact that the plaintiff failed to prove his entitlement to the loss of profits as aforesaid, the computation for the alleged loss of profits by the plaintiff is totally erroneous. A perusal of the claim by the plaintiff in part 2 of para. 37 of the SOC would show that the claim in the computation of the loss of profits by the plaintiff was incorrect for the following reasons:

(i) As stated earlier, the plaintiff had incorrectly assumed that the V20 project would be carried out till completion when the evidence proved that the said project was no longer in existence;

(ii) The plaintiff had assumed that the V20 project would cost RM144,040,000 when the evidence showed even in 1997, the defendant had intended only to proceed with the workers' apartments at the cost of RM65,677,300. The total construction costs were only applicable for the schematic design phase which comprised 15% of the overall total architectural works. The remainder 85% of the total architectural works was in respect of the workers' apartments at RM65,677,300. Thus, it is a known fact that the construction costs for the schematic design phase (RM144,040,000) and the construction costs for the three other phases (RM65,677,300) was different. The plaintiff had adopted different construction costs for the various phases in the computation for the fees for the work done in 1997. Refer to the plaintiff's pleaded claim at para. 37 part 1 of the SOC.

(iii) Even looking at the 2005/2006 cost of the alleged revived V20 project, according to the preliminary costs estimate no 5 dated 14 July 2006, it was only at RM22 million.

(iv) The plaintiff's estimate of his professional fees was inaccurate and was contradicted by the evidence of DW2 in his first expert report. The evidence of DW2 was never challenged.

(v) The estimated costs and expenses to be incurred by the plaintiff to complete the V20 project was not supported by any credible documentation. It was premised upon PW1's bare allegation which lacks support and the plaintiff's expert, PW2 failed to carry out any evaluation in this regard.

[89] The plaintiff's claim for loss of profits was specifically confined to the V20 project as pleaded at para. 37 part 2 of the SOC. The evidence which was tendered at trial for the alleged loss of profits was for V20 project only. The plaintiff was not claiming for any alleged loss of profits for the 2005/2006 project. The reason according to PW1 is:

> that the Project in 1997 is more likely to be completed and it was progresses (*sic*) much further than the one in 2006, i.e. in 1997 I had submitted my work to MPKK and obtained the approval from the Fire department. Thus, my prospect of earning is in the reliance should the Project is fully completed back in 1997.

[90] However, the facts show that the works by the plaintiff for the V20 project were rejected by MPKK and were of no use or benefit to the defendant.

[91] At para. 37 part 2 of the SOC, the plaintiff pleaded that the "estimated costs and expenses to be incurred by the plaintiff to complete the project" was RM1,857,600. This amount is the expenses which plaintiff contended that he would have incurred in order to complete 100% of the architectural works for the 1997 project. Therefore, if we are to adopt the expenses as pleaded by the plaintiff, the plaintiff's claim for the alleged loss of profits would work out as follows:

	Particulars	Amount
1.	Schematic Design Phase (15%) RM144,040,000.00 x 4.13% x 15%	RM892,080.00
2.	Subsequent 3 other phases (design development phase, Contract Documentation Phase and Project Implementation Phase) (85%) RM65,677,300.00 x 4.13% x 85%	RM2,282,825.00
3.	Total architectural fees (100%) that could be earned if the 1997 Project had been completed (Item 1 + Item 2)	RM3,173,905.00
4.	LESS Claim for work done for professional fees in year 1997	(RM1,957,400,49)
5.	Estimated costs and expenses to be incurred by the Plaintiff to complete the project	(RM1,857,600.00)
	LOSS (Item No. 3 – Item No. 4 – Item No. 5)	- RM 641,095.49

[92] The architectural fees for the work done in 1997 were conceded by the plaintiff as barred by limitation. Hence, this sum must be deducted from the total claim for loss of profits. If not deducted, the plaintiff's claim would be for the loss of profits together with the work done in 1997, which is wrong.

[93] The calculation above depicts a situation that the plaintiff would not have earned any profits based on the pleaded case in para. 37 part 2 of the SOC. In fact, the plaintiff suffered a loss of RM641,095.49, hence negating the claim for the loss of profits by the plaintiff.

[94] Therefore, if the plaintiff proposed to make a claim for the loss of profits, logically it would be based on the 2005/2006 project and certainly not the 1997 project which had been overtaken by the aforesaid events and which was conceded by the plaintiff to have been barred by limitation. Hence, it would appear that the plaintiff's claim for the alleged loss of profits for the 1997 project is without merit and unfounded. This was pleaded by the defendant in its statement of defence at para. 28(b)(2).

[95] As for the 2005/2006 project, the plaintiff did not tender any evidence for any alleged loss of profits for the 2005/2006 project. In any event, there was no invoice submitted to the defendant for the claim for the 2006 works.

Section 74 Of The Contracts Act 1950

[96] In the course of his arguments, counsel for the plaintiff referred to s. 74(1) of the Contracts Act 1950.

[97] Counsel for the plaintiff submits that the plaintiff would not have terminated the agreement if not for the repudiation by the defendant of the agreement in 2015. The plaintiff claimed that he had performed the contract whenever he was instructed by the defendant to do so from March 1997 until the termination in 2015. The plaintiff claimed further that he remained ready and willing to perform the agreement until he accepted the defendant's repudiation. The plaintiff contends that the defendant was quite content to have the plaintiff being available to perform professional services under the agreement as and when it wanted his services for the V20 project. It was only until late December 2014 that the plaintiff felt that he might not be wanted any more on the V20 project.

[98] From the submission of the plaintiff, the blame appears to be on the defendant who apparently kept the plaintiff hanging on to the contract, which we found to be without merits. It is open to the plaintiff to terminate the agreement upon the occurrence of the repudiatory events as early as 1997. However the plaintiff elected to keep the agreement alive until 2015. Once elected, there is no issue of the plaintiff subsequently exercising right of termination.

[99] In any event, we do not see how that argument by the plaintiff has anything to do with s. 74 of the Contracts Act 1950. Nevertheless we will address the said section just the same. Section 74 of the Contracts Act 1950

statutorily incorporated the rule in *Hadley v. Baxendale* [1854] 9 Ex 341. The significance of *Hadley v. Baxendale* rule is such that, it established a limitation on the claim for damages to those which naturally arise from a breach and are reasonably contemplated by the contracting parties at the point of contract formation. These damages are essentially consequential. In *Hadley v. Baxendale* (*supra*), Hadley claimed against Baxendale for special damages in the form of loss of profits although he did not inform Baxendale of the special circumstances, which is, his mill operation was entirely dependent on receiving a replacement mill shaft, of which Baxendale was supposed to deliver on an agreed date. Hadley failed to inform Baxendale that the mill was dependent and inoperable until the new mill shaft is delivered. It was pointed out by the courts that not all broken mill shafts render the mill inoperable resulting in loss of profits. There may be situation where some mills may have temporary mill shafts for use when one is broken or out for repair. Therefore, Baxendale was held to be not liable for the damages arising out of Hadley's unknown circumstances.

For clarity, we reproduce herein s. 74 of the Contracts Act 1950 which states:

> 74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, *which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it*.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> (3) ... (emphasis added)

The first limb consists of the phrase "naturally arose in the usual course of things" which is similarly worded as in *Hadley v. Baxendale* (*supra*) for the recovery of loss or damage which naturally arise in the usual course of things from the breach.

As for the second limb, the phrase of "which the parties knew", is stricter than the rule in *Hadley v. Baxendale* (*supra*) as it requires parties to have knowledge of the loss or damage likely to result from a breach of contract. It does not allow damages to be awarded where the losses are merely in the contemplation of both parties as in *Hadley v. Baxendale* (*supra*).

[100] The Federal Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1995] 1 AMR 41 established the general principle that in the assessment of damages for the breach of contract, the aim is to place a party who has sustained a loss by reason of a breach, so far as money can do it, in the same situation as if the contract has been performed. In other words, the award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with plaintiff.

Therefore, it is incumbent on the plaintiff to prove causation between the defendant's breach and his loss provided that the loss is not too remote.

In *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd* (*supra*), there was an agreement between the appellant and the respondent for the appellant to sell to the respondent certain land for the purpose of development. The appellant terminated the agreement when the respondent failed to pay the balance purchase price within the stipulated time. The respondent commenced an action claiming wrongful termination of the agreement, and for damages for loss of profits, for the delay in delivering title. The Federal Court, in assessing damages, held that any price increase in the land should be deducted from the loss of profits, or else it would put the respondent in a better position than it would have been if the contract had been performed. The court found that the respondent had in fact suffered no loss by reason of the breach of the agreement because the value of the land had increased by nearly RM70 million. The court found that the respondent failed to prove its claim for loss of profits, nonetheless, the court awarded the respondent nominal damages of RM10.

Further illustrations on how the court dealt with the claim of loss of profits can be found in the decision of the Supreme Court in *Bank Bumiputra Malaysia Bhd, Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495, where the respondent proposed to develop a few pieces of land in Dungun, and agricultural lands in Alor Gajah into housing estates. There was an overdraft facility granted by the appellant to the tune of RM4.5 million to the respondent for both projects. The appellant knew that the repayment for facility for the Alor Gajah project would be recovered from the Dungun project's profits revenue. However, before the term of the overdraft facility ended, the appellant withdrew the overdraft facility and demanded payment of the money due together with interest. The respondent claimed for damages for both projects as the appellant had breached the bridging loan agreement. The Supreme Court allowed the claim for loss of profits with regards to the Dungun project as the appellant had known that if the overdraft facility was frozen, the project would be affected. The court further stated that the loss of profits was the natural and probable result of the breach of agreement (first limb of s. 74(1), and the appellant knew of the loss the respondent would suffer if they committed the breach (second limb of s. 74(1)).

The court, however dismissed the claim for loss of profits for the Alor Gajah project which was dependent upon the application of profits expected from the Dungun project, and was held to be too remote.

[101] Applying the principle as established by the aforesaid cases to our present appeal, there is no causation established between the breach and the loss of profits by the plaintiff. It has not been shown by the plaintiff that the loss of profits was the natural and probable result of the breach by the

defendant (first limb of s. 74(1), and neither has it been shown that that the defendant knew of the loss the plaintiff would suffer if they committed the breach (second limb of s. 74(1)) at the formation of the contract.

There is no evidence to show that the V20 project was ongoing. In fact, the plaintiff knew that the V20 project was deferred as early as 1997, and that as of 1997 there was no beneficial work done by the plaintiff (due to the fact that the plans at the schematic design stage were rejected by MPKK). The plaintiff could have exercised his option of termination from the period of 1997 when the defendant told the plaintiff that the project was deferred. At this stage, there was no work done by the plaintiff from 1997 until 2005/2006. There was a good eight years of silence by the plaintiff until 2005/2006 when the defendant approached the plaintiff to redesign the project, which indicated that the 1997 project was no longer in existence. Hence what professional fees could the plaintiff claim against the defendant for 1997; more so, damages in the form of loss of profits?

[102] What is more telling is the supervening event of the defendant selling the land to Wilayah Jasa Sdn Bhd. Surely that is already an indication as to the fate of the project. By that time, the V20 project was no longer in existence and superseded by the 2005/2006 work. Even then, there was no development of any work in 2006. Despite the aforesaid, after 18 years had passed and the V20 project was no longer in existence, the plaintiff decided to make a claim for loss of profits.

[103] Clearly, there is no nexus direct or indirect between the alleged breach of the defendant to the claim for the loss of profits. The plaintiff failed to prove the causation between the defendant's breach and his loss of profits. It is already too remote. Applying s. 74(2) of the Contracts Act 1950, such compensation is hence not recoverable.

Whether The Plaintiff's Claim Is Barred By Limitation

[104] It is the defendant's stand that the plaintiff's claim for loss of profits is barred by limitation pursuant to items 94 and 95 of the Schedule to the Limitation Ordinance (Sabah Cap. 72).

[105] The claim by the plaintiff is for the loss of profits from the architectural fees that the plaintiff could have earned if the 1997 project or V20 project had been completed. Essentially, it is for compensation for breach of the 1997 project by the defendant.

[106] The plaintiff's writ and its statement of claim was only filed on 22 March 2016. The relevant provisions of the Limitation Ordinance (Sabah Cap. 72) reads as follows:

Description of Suit	Period of Limitation	Time from which period begins to run
94. For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for ….	Three years	When the contract is broken, or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases.
Description of Suit	Period of Limitation	Time from which period begins to run
95. For compensation for the breach of a contract in writing	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.

[107] Item 94 of the Schedule to the Limitation Ordinance states that the time from which the limitation period begins to run for compensation for breach of any contract, express or implied not in writing as:

> When the contract is broken; or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing when it ceases.

[108] The plaintiff's claim for the alleged loss of profits was specifically confined to the 1997 project as pleaded at para. 37 part 2 of the statement of claim.

[109] In addition, the evidence tendered at the trial for the alleged loss of profits was exclusively for the 1997 project only. The plaintiff was not claiming for any alleged loss of profits for the 2005/2006 project. PW1 had testified that he was claiming for the alleged loss of profits for the 1997 project because (in his own words):

> The reason is that the Project in 1997 is more likely to be completed and it was progressed much further than the one in 2006, i.e. in 1997 I had submitted my work to MPKK and obtained the approval from the Fire Department. Thus, my prospect of earning is in the reliance should the Project is fully completed back in 1997.

(Refer to p. 69 of core bundle)

[110] The plaintiff had submitted its payment claim dated 10 December 1997 for the sum of RM2,476,349.60 for the building works purportedly on the basis that 21% of the professional fees was due. The plaintiff also claimed 5% service tax thereon amounting to RM123,817.48. Thus the total amount claimed by the plaintiff for the professional fees for the building works was

RM2,600,167.08 in its claim dated 10 December 1997 (p. 238 of CCB). A

[111] PW1 admitted that the plaintiff's claim in part 1 of para. 37 of the SOC was based on the plaintiff's claim dated 10 December 1997 (p. 459 CBOD2). Similarly, the plaintiff's letters dated 12 January 2004 and 8 March 2008 were in respect of the same work done in 1997. B

[112] The defence of limitation was expressly pleaded in the statement of defence against the plaintiff's alleged loss of profits.

[113] Items 94 and 95 of the Schedule to the Limitation Ordinance provide that the plaintiff's cause of action for compensation for the breach of the 1997 project by the defendant would be barred by limitation after six years from C the time when the contract is broken. This is applicable to both antecedent breaches of agreement as well as repudiation thereof.

[114] The issue is whether the limitation period had lapsed in respect of the plaintiff's claim for loss of profits. The cause of action arose at the time the alleged breach of contract occurs. The claim for the loss of profits was in D respect of the 1997 project. It accrued when the defendant deferred the V20 project on 21 November 1997 or upon non-payment of the plaintiff's claim dated 10 December 1997 (p. 238 CB).

[115] From the claim issued out by the plaintiff *vide* letter dated 10 December 1997, it appears that the limitation had started to run against E the plaintiff's claim dated 10 December 1997 from 11 December 1997 which was the earliest time that the plaintiff could have brought an action for its claim against the defendant.

(Refer to *Borneo Housing Mortgage Finance Bhd v. Mygal Gibie & Anor* [2004] F 2 CLJ 525; [2004] 4 MLJ 12; *Malayan Banking Bhd v. Saujana Pesona Sdn Bhd* [2016] 10 CLJ 92; [2016] 3 MLJ 352).

[116] The plaintiff submits that his cause of action for the alleged loss of profits for the 1997 project only arose upon the termination of the agreement on 24 October 2015. This was evidenced by two letters issued out by the G plaintiff dated 14 July 2015 and 25 August 2015. This was never addressed by the learned trial judge.

[117] We formed the view that there is no merit in the argument of the plaintiff. The termination of the agreement on 24 October 2015 from which the alleged damages for the loss of profits arose, is different from the accrual H of the plaintiff's cause of action for the damages for the alleged loss of profits pursuant to items 94 and 95 of the Schedule to the Sabah Limitation Ordinance. In support for this proposition, the learned author Adam Kramer in "*The Law of Contract Damages*" (2nd edn) at paras. 1-04 has this to say:

> Breach of contract is actionable *per se*. Unlike the tort of negligence, for I example, the cause of action for breach of contract does not require any

damage to have been suffered. Breach alone is enough. This means that limitation starts to run against a contract claim (including for breach of a contractual duty of care) on the date of breach (the date on which the cause of action arises), whereas on a tortious negligence claim it runs from the date of damage (the date on which that cause of action arises).

[118] *Chitty on Contracts* (32nd edn) at paras. 28-32 amplifies this proposition by stating that:

> The gist of an action for breach of contract is the breach, and not the resulting damage which may be occasioned thereby. Consequently, the act runs from the time when the contract is broken, and not from the time at which any damage resulting therefrom is sustained by the claimant.

[119] The Federal Court in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749 held that a cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action.

[120] Further, in the Federal Court case of *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717; [2006] 2 MLJ 209, the court held that:

> (3) A cause of action founded on contract accrues on the date of its breach and time begins to run from that breach. In the instant case, the claimant's cause of action only arose when the appellant allegedly breached its obligation to pay the claimant his commission in 1986. When the claimant filed his action in court in 1993, the claim had already become time barred (*Nasri v. Mesah* [1970] MLJ 32 and *Board of Trade v. Cauzer & Co* [1972] AC 610 followed).

[121] Pursuant to items 94 and 95 of the Schedule, six years from the time when "the contract is broken", namely from the first time that the defendant repudiated (suspension of the V20 project) the claim would be on 21 November 1997 or upon non-payment of the plaintiff's claim dated 10 December 1997. Section 8(1) of the Limitation Ordinance provides that when time began to run, no subsequent disability or inability to sue stops it. Hence, time starts to run continuously from the earliest repudiation of the agreement.

[122] Premised on the aforesaid, the termination of the agreement by the plaintiff is not the plaintiff's cause of action for damages for the alleged loss of profits. Limitation does not affect a plaintiff's cause of action. There is a distinction between "a cause of action" and "right to enforce the cause of action". This was aptly explained by Donaldson LJ in *Ronex Properties Ltd v. John Laing Construction Ltd & Ors (Clarke Nicholls & Marcell (A Firm), Third Parties)* [1983] 1 QB 398 in delivering the judgment of the Court of Appeal said the following:

> What is thought to be clear that there is a defence under the Limitation

> Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous and vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

[123] Further support can be found in *Chitty on Contracts*, 32nd edn at p. 2043 at paras. 28-32:

> General rule in contract. The general rule in contract is that the cause of action accrues, not when the damage is suffered, but when the breach takes place ...

At p. 2080:

> General. Except for the provisions governing extinction of title in relation to land, and goods, and the 10-year long-stop period for actions under Pt 1 of the Consumer Protection Act 1987, the effect of Limitation Act 1980 is merely to bar the claimant's remedy and not to extinguish his right. Limitation is a procedural matter, and not one of substance: the right continues to exist even though it cannot be enforced by action.

[124] By failing to commence the claim against the defendant for the alleged loss of profits within six years from the breach, namely 21 November 1997 or upon non-payment of the plaintiff's claim dated 10 December 1997, the plaintiff's right to enforce a claim against the defendant is barred by limitation. By either dates the claim by the plaintiff is equally barred by limitation.

[125] Therefore, for the purpose of computation of the limitation period, limitation had already set in very much earlier in 1997 before the termination by the plaintiff on 24 October 2015.

[126] The plaintiff's claim for the alleged loss of profits for the 1997 project was misconceived and was not maintainable on the facts of this case due to limitation. The learned trial judge did not err when making such findings.

Whether The Plaintiff Was In Breach Of The Agreement Because Of The Rejection Of The Development Plans By MPKK

[127] The plaintiff submits that the learned trial judge erred in holding that the plaintiff was in breach of the agreement because of the "rejection of the development plans by MPKK" and accordingly not entitled to receive any payment in respect of the three phases of architectural work. There has been no complaint on the part of the defendant on this alleged breach, apart from the fact that this was never pleaded by the defendant and neither was it an issue to be tried. We form the view that the learned trial judge erred when he made such findings, as the rejection of MPKK of the plans submitted by the plaintiff, does not amount to breach of agreement on the part of the

A plaintiff.

[128] Be that as it may, this does not have any effect on our finding that the plaintiff's claim for the damages of the loss of profits is unsustainable for the reasons as aforesaid.

B **Conclusion**

[129] Hence, given the circumstances, unanimously we find that there is no appealable error on the part of the learned trial judge in dismissing the claim by the plaintiff.

C **[130]** The appeal by the plaintiff is dismissed with no order as to costs. We hereby affirm the decision of the learned trial judge of the High Court.

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